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No. 10-344

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALONSO ALVINO HERRERA,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

BRIEF OF SHARI SEIDMAN DIAMOND, VALERIE HANS, KENNETH S. KLEIN, STEPHAN LANDSMAN, MICHAEL SAKS, RITA SIMON, AND NEIL VIDMAR AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment, as incorporated against the States by the Fourteenth, likewise requires a unanimous jury verdict to convict a person of a crime.

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INTEREST OF AMICI CURIAE[1]

Amici are law school professors whose teaching and scholarship has addressed the empirical and constitutional questions about jury unanimity. Amici are identified in the Appendix.

SUMMARY OF ARGUMENT

This brief summarizes the implications of the empirical work on the consequences of requiring, or not requiring, unanimity. The Petition for Writ of Certiorari argues that unanimity is a fundamental right protected by the Fourteenth Amendment. This amici brief develops a sister-argument – requiring unanimity promotes empirically demonstrable benefits, while imposing at most *de minimus* costs.

ARGUMENT

Empirical evidence paints a nuanced picture of the consequences of a unanimity requirement. Requiring unanimity lengthens deliberations, promotes mature deliberations, promotes consideration of

[1] This brief was drafted exclusively by the named amici. Neither party nor their counsel made any monetary contribution to the preparation or submission of this brief.

The parties were notified ten days prior to the due date of this brief of the intention to file; they have consented to the filing of this brief.

minority viewpoints, reduces the incidence of factual error, increases community, juror, and litigant confidence in verdicts, and slightly increases hung jury rates.

When unanimity is not required, jurors tend to end their deliberations soon after the required quorum is reached. A study examining the deliberations of actual Arizona civil juries in which only six of eight jurors had to agree to the verdict found that jurors were quite conscious that they needed only a six-to-two majority in order to return a verdict. Shari Seidman Diamond, Mary R. Rose, and Beth Murphy, *Revising the Unanimity Requirement: The Behavior of the Non-unanimous Jury*, 100 NW. U. L. REV. 201 (2006). On some juries the majority attempted to persuade those in the minority even when their votes were not required; on other juries, the majority relied on the fact that they were permitted to deliver a majority verdict, terminated any attempt to resolve differences, and ended the debate when the required minimum vote was reached. On those juries, once the requisite majority was achieved, dissenting views were dismissed.

Experimental studies confirmed the conclusion suggested by the study of Arizona juries – simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach non-unanimous verdicts. See James H. Davis, Norbert L. Kerr, Robert S. Atkin, Robert Holt, and David Meek, *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. PERSONALITY & SOC.

PSYCHOL. 1 (1975); Dennis L. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying, and Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. (2001); Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 SOCIOMETRY 305 (1976); REID HASTIE, STEVEN PENROD, AND NANCY PENNINGTON, INSIDE THE JURY (1983); Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCH. 38 (1977); and MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE (1977).

Post-trial evaluations by real jurors deliberating under a non-unanimous decision rule revealed that jurors who reached unanimous verdicts rated their deliberations as more thorough than both majority and holdout jurors who served on juries that ended with non-unanimous verdicts. Diamond et al. (2006). Juries required to reach unanimity rated those deliberations as more thorough than juries assigned to a non-unanimous decision rule. Devine et al. (2001); HASTIE et al. (1983).

Several experimental jury simulation studies have found that jurors holding minority views participate less and are seen as less influential when unanimity is not required. Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1 (2001); VALERIE P. HANS AND NEIL VIDMAR, JUDGING THE JURY, 174-75 (1986); HASTIE et al. (1983); David A. Vollrath

and James H. Davis, *Jury Size and Decision Rule*, in THE JURY: ITS ROLE IN AMERICAN SOCIETY ch. 5 (Rita J. Simon ed., 1980). Minority jurors operating under a majority decision rule are less likely to report that they made the arguments that they wanted to make, compared to minority jurors deliberating under a unanimity rule. Norbert L. Kerr, Robert S. Atkin, Garold Stasser, David Meek, Robert W. Holt, and James H. Davis, *Guilt Beyond a Reasonable Doubt: Effects of Conceptual Definition and Assigned Rule on the Judgment of Mock Juries*, 34 J. PERSONALITY & SOC. PSYCHOL. 282 (1976). As a juror in a majority with enough members to reach a verdict told a fellow juror in the minority during deliberations in an Arizona civil trial, "no offense, but we are going to ignore you." Diamond et al. (2006), at 216.

Recently, the National Center for State Courts conducted a study of the causes of hung juries in felony trials in four jurisdictions, all of which require jury unanimity. Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *Are Hung Juries a Problem?* (2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf; Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, and G. Thomas Munsterman, *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003). Questionnaires from approximately 3500 jurors provided information on the jury's first ballots and final verdicts. In most cases, a verdict was reached and the verdict favored by a majority on the

first ballot prevailed. Notably, in over ten percent of the cases, jurors who favored a minority position at the time of the first ballot were able to convince the majority jurors to adopt the minority's favored verdict. Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI-KENT L. REV. 579, 583, Figure 1 (2007). Empirical studies of grand juries, which do not have a unanimity requirement, find that the group does not consider minority points of view. Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 93 & n.113 (1993).

Requiring unanimity increases the frequency of hung juries, but only slightly. Juries required to reach unanimity are more likely to hang than juries permitted to arrive at a verdict without obtaining consensus, but the available data suggest that the difference is modest, approximately 5.6% versus 3.1%. HARRY KALVEN, JR. AND HANS ZEISEL, THE AMERICAN JURY (1966), at 461. The reason for this modest difference is that hung juries are rarely caused by one or two jurors who are consistently at odds with the rest of the jury. Rather, hung juries are most likely when the jury is initially more evenly divided. For example, in the National Center for State Courts study of felony juries, in those cases in which only one or two jurors were in the minority on the first ballot, only 2.9% ended with a hung jury. Hannaford-Agor et al. (2002), at 66, Table 5.2. In the 83 percent of the cases in which hung juries did occur, the minority position

was initially supported by at least three jurors. (*Id.*). This result replicates a tentative finding reported by Kalven and Zeisel, showing that hung juries tend to occur only when a substantial minority exists, rather than when a single eccentric juror or even two jurors refuse to see reason. KALVEN AND ZEISEL (1966). Jury deadlocks predominantly reflect genuine disagreement over the weight of the evidence, rather than the irrationality or stubbornness of one or two unreasonable jurors. When deliberations begin with an overwhelming majority favoring one verdict or the other, they are highly unlikely to end in a hung jury.

Jurors themselves are less confident in the accuracy of their own verdicts when they are not required to agree unanimously. HASTIE et al. (1983); SAKS (1977); Nemeth (1977). Community residents who rated the procedures used in jury trials viewed unanimous procedures as fairer and more accurate than non-unanimous procedures. Robert J. MacCoun and Tom Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency,* 12 LAW & HUM. BEHAV. 333 (1988). Jury deliberation has been demonstrated as the key element of the jury system that promotes its soundness as a fact finder. Dennis J. Devine, Jennifer Buddenbaum, Stephanie Houp, Dennis P. Stolle and Nathan Studebaker, *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMPIRICAL LEGAL STUD. 273 (2007).

Actual data *from Oregon* aptly illustrates the interplay between hung jury rates, consideration of

minority viewpoints, and allowing conviction without unanimity. The hung jury rate nationally is approximately 5.6%. In Oregon, according to a recent study, the hung jury rate in felony cases in 2007 was 3.2%, and in 2008 was 2.5%. OREGON OFFICE OF PUBLIC DEFENSE SERVICE APPELLATE DIVISION, A PRELIMINARY REPORT TO THE OREGON PUBLIC DEFENSE SERVICES COMMISSION (May 21, 2009) p. 4, available at http://www.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf?ga=t. Most notably, however, the Oregon juries reached a non-unanimous verdict on at least one count in *65.5%* of cases. (*Id.*) Eliminating the requirement of unanimity in Oregon apparently garnered a less than 3% increase in conviction rates, but truncated fully accounting for minority viewpoints in over 65% of deliberations.

So, where does this leave matters when thinking about a unanimity requirement? First, the primary perceived downside of requiring unanimity – having a less efficient system with longer deliberations and more hung juries – while real, is manageable. Forty-eight states require unanimity, and report no difficulties with an efficient justice system reaching verdict in the vast majority of cases. While requiring unanimity does result in an incremental increase in hung juries, the total "increase" is less than 3%.

By contrast, requiring unanimity results in a variety of benefits. And some of these benefits are of constitutional import. Unanimity increases public confidence in jury verdicts; in *Taylor v. Louisiana* this Court recognized that cross-sectionalism in jury

venires, panels or lists "is essential to the fulfillment of the Sixth Amendment" in part because community participation in the administration of criminal law is "critical to public confidence in the fairness of the criminal justice system."[2] Unanimity reduces the risk of convictions resting on factual error; in *Cage v. Louisiana* this Court held that the reasonable doubt standard is mandated by the Fourteenth Amendment because "'[i]t is a prime instrument for reducing the risk of convictions resting on factual error.'"[3]

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[2] 419 U.S. 522, 526, 530 (1975).

[3] 498 U.S. 39, 39-40 (1990), *disapproved of on other grounds*, Estelle v. McGuire, 502 U.S. 62, 72 n. 4 (1991). *Cage* quotes from *In re Winship*; *Winship* actually links the importance of accuracy of fact finding and public confidence in verdicts. 397 U.S. 358, 364 (1970).

CONCLUSION

This case presents the opportunity for this Court to recognize that constitutionally enshrined values and converging empirical evidence demand the requirement of unanimity. The amici encourage this Court to do so.

Respectfully submitted,

OCTOBER 13, 2010

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